approved survey plan which also happened to be the date the first logging permit was issued. The appellant argued that it would not be right that sixty-month period should commence from the date of the first survey plan when it was not correctly drawn up. With respect there is no basis for this opinion. What the appellant is trying to do is to interpret the words of the agreement to suit their own case on the face of clear words "effective forthwith" in the agreement. The word "forthwith" means "without any delay or loss of time" and a word which does not imply delay but quite the reverse. See *Roberts* v. *Brett*[1] which imply adopted as to the meaning of "forthwith" in *Hudson* v. *Hill*.[2]

The appellant in fact knew that the contract was to commence forthwith for there is clear evidence that the appellant knew the period of 60 months commenced from August 5, 1974 or thereabout. The Managing Director of the appellant company (PW 4) admitted that the first three lines of the postscript were typed by his office (page 36), line c-d. More importantly the application for extension of time by the appellant company would seem to be consistent with knowledge that the contract was about to expire. The letter from the appellant company dated May 17, 1979 asking for one year's extension said at page 233:

"Our target date was delayed due to the flood caused by the seasonal rain of the previous year. Besides the timber permit was only approved on 1/8/1977."

It would seem clear from this letter that the appellant company knew that the contract period was expiring and an extension of one year was required as the target date could not be met because of the reason given. A fair conclusion is that the appellant had known all along that the commencement of the agreement was either from August 5, 1974, that is, the date of the letter, or at the very latest August 9, 1974 which is the date the first survey plan was prepared but this is unlikely because there is nothing in the letter referring to that.

**Wan Hamzah S.C.J.** : I have read the judgments in draft of my learned colleagues Tan Sri Datuk Hashim bin Yeop Abdullah Sani S.C.J., and Datuk Syed Agil bin Syed Hassan Barakbah S.C.J. I agree that the appeal should be dismissed. I have nothing to add to the judgments of my learned colleagues.

*Appeal dismissed.*

Solicitors : *Skrine & Co.; Bachan & Co.*

## CHU CHOON MOI v. NGAN SEW TIN

**[S.C. (Salleh Abas L.P, Wan Suleiman & Syed Agil Barakbah S.C.JJ.) March 4 & July 19, 1985]**

**[Kuala Lumpur – Federal Court Civil Appeal No. 188 of 1984]**

*Land Law – Fraudulent transfer – Damages for alleged wrongful caveat – Proof of fraud – National Land Code, ss. 2 & 340.*

*Practice and Procedure – Appeal – Failure to take into account probative value of evidence – Appellate court can interfere – Evidence Act, 1950, ss. 3, 45 & 47.*

In this case the appellant sought a declaration that the property in question belonged to the appellant's husband and should be transferred to the estate on his death. The respondent is the wife of one David Yong, the son of the deceased. He was responsible for transferring the property to his wife instead of including it in the estate of his deceased father. The respondent filed a counterclaim against the appellant for damages for wrongfully caveating the said property. The learned trial judge dismissed the appellant's claim and also the respondent's counterclaim. The appellant appealed and the respondent brought a cross-appeal.

**Held:** (1) in this case the learned trial judge had failed to take into account the probative value of the evidence which had been proved and in the circumstances the appellate court had to interfere.

(2) the transfer of the land to the respondent was fraudulent and although she was the registered owner she cannot claim indefeasibility of title under section 340 of the National Land Code because of fraud under section 2 (a) to which she was privy. Nor could she be termed a *bona fide* purchaser in good faith and for valuable consideration under the proviso to that section in order to protect her title or interest;

(3) the cross-appeal relating to the damages for the alleged wrongful caveat must be dismissed.

*Cases referred to:*

(1) *Johara Bi* v. *Lawrence Lam* [1981] 1 M.L.J. 139.
(2) *Narayanan* v. *Official Assignee, Rangoon* A.I.R. 1941 P.C. 93.
(3) *Saminathan* v. *Pappa* [1981] 1 M.L.J. 121.
(4) *Liew Kaling & Ors.* v. *Public Prosecutor* [1960] M.L.J. 306.

SUPREME COURT.

*Franklin Goonting* for the appellant.
*Ahmad Moosdeen* for the respondent.

*Cur. Adv. Vult.*

**Syed Agil Barakbah S.C.J.** (delivering the Judgment of the Court) : This appeal involved a claim by the appellant (plaintiff in the Court below) against the respondent (defendant in the Court

below) over a piece of land held under Q.T. (R) 24 Lot No. 27 Section 14, Bentong, Pahang with house No. 27 thereon registered in the name of the respondent on the grounds that the said property belonged to the appellant's husband and should be transferred to his estate on his death. As the widow of the deceased, she sought a declaration that she was entitled to a share in the said property. The respondent is the wife of one David Yong, the son of the deceased and the stepson of the appellant. He was responsible for transferring the said property to his wife instead of including it in the estate of his deceased father. His contention was that he had bought the property from the former registered owner. The respondent filed a counterclaim against the appellant for damages for wrongfully caveating the said property. The learned trial Judge dismissed the appellant's claim with costs and also the respondent's counterclaim with costs. Both parties appealed. We allowed the appellant's appeal with costs but dismissed the respondent's cross-appeal with costs. We now give our reasons for doing so.

According to the salient facts, the deceased was a housing developer running his business under the name of Ban Hua Development Co. at No. 28 & 30, Jalan Sungai Besi, Kuala Lumpur. He had a nephew named Paw Ching Yew ("Paw") a businessman residing at Port Dickson, Negeri Sembilan who purchased Lot 27 from another developer through his introduction and became the first registered owner thereof. In the year 1968 an Indian friend named Ponnu who had retired from the government service requested the deceased to build a house for him on Lot No. 32, Section 14 Q.T. (R) 62, Bentong which Ponnu had purchased. Lot 32 was adjacent to Lot 27. The agreement between them was that the deceased allowed Ponnu to occupy the house on Lot 27 while Ponnu's house on Lot 32 was being constructed. Since the said property was registered in the name of Paw, an agreement was executed on June 22, 1968 between the three, *viz.*, Paw as the assignor, Ponnu as the assignee and the deceased as the "Builder" and on certain payments to be made by Ponnu to Paw and the deceased, Paw assigned all his beneficial interest in Lot 27 to Ponnu (AB.1 on pages 164 to 166 of Appeal Record; called "the first agreement"). It appeared that the purpose of executing the agreement was to enable Ponnu to occupy the house on the said Lot until the house on Lot 32 was completed and Ponnu could then exchange the former with Lot 32. Subsequently on January 7, 1969 the deceased in the name of his company executed another agreement with Ponnu for the construction of house Type B5A on Lot No. 32 (called "the second agreement). When the house on the said Lot was completed, the deceased and his wife, the appellant occupied it with their children and Ponnu continued occupying Lot 27. On January 2, 1971 the deceased and Paw executed an agreement in Chinese whereby Paw sold Lot 27 to the deceased at a price of $22,000/- (called "the third agreement"). Later, on Ponnu's request the deceased agreed to have the lots exchanged by cross-transfer, *i.e.*, Lot 27 to Ponnu and Lot 32 to himself but before it was done the deceased passed away on September 5, 1976 after being involved in a road accident. In the appeal before us two main issues were argued. First, whether Lot 27 was bought by the deceased from Paw and whether on his death it should form part of his estate. Secondly, whether the transfer of the said Lot to the respondent was fraudulent.

In the first place, the learned trial Judge having considered the first agreement concluded that Paw had no more title in the property to pass to the deceased and the alleged sale to the deceased in 1971 (referring to the third agreement) could not be valid. In the result, the appellant could not claim the property to be included in the assets of the estate of the deceased. She could not therefore claim a share in the said property as a beneficiary of the deceased. In arriving at that conclusion the learned Judge failed to take into account the arrangement made between Ponnu, Paw and the deceased regarding the first agreement whereby Paw assigned Lot 27 to Ponnu with the consent of the deceased. Ponnu's evidence clearly manifested their intention that Ponnu was to occupy the house thereon free of rent until the construction of house No. 32 was completed by the deceased. Thereafter he could exchange Lot 27 with Lot 32. No doubt subsequently Ponnu requested the deceased who agreed that Lot 27 be transferred to Ponnu and Lot 32 be transferred to deceased. However, before he could do so, the deceased died. Ponnu himself never claimed that he had purchased both Lots. He also said that Lot 27 belonged to the deceased but was registered in Paw's name. He claimed to be the owner of Lot No. 32 but not Lot No. 27. That was quoted by the learned Judge in his grounds. He also accepted Ponnu as a semi-literate but an honest and reliable witness. Ponnu's action clearly indicated his anxiety as a retired government servant to have the house registered in his name and to occupy it with his family as soon as possible. About ten weeks or so after the deceased's death, Ponnu went to see the appellant about the cross-transfer. David Yong whom he came to know

as the son of the deceased and some other members of the family were present. According to the appellant David Yong took over as manager of the business on his father's death. It appeared that they agreed to have the cross-transfer, *i.e.*, Lot 27 to Ponnu and Lot 32 to them. Ponnu was anxious to have the transfer and the title to Lot No. 27 as shown by his letter to his solicitors requesting the matter be expedited. (Ex. AB.4 on page 178 of Appeal Record). For some reason or other he agreed to transfer Lot 32 to the respondent who was David Yong's wife. Subsequently however he wrote another letter to his solicitors (AB.5 on page 179 of the Appeal Record) requesting them to hold back the transfer because a caveat had been lodged on Lot 27 by the appellant and he withdrew his consent to transfer his property Lot 32 to the respondent. It is clear from the above that Ponnu neither claimed nor acted upon the assignment in the first agreement as the owner of Lot 27. His agreement to have it transferred to him in lieu of Lot 32 was as stated earlier because of the anxiety on the delay. Nevertheless, on learning the true position, he changed his mind about transferring Lot 32 to the respondent. In the circumstances, it cannot be said that the third agreement could not be valid. The learned Judge further said in his grounds:

". . . Even if it were true that he had purportedly bought it from Paw, the purchase would be null and void because it would have been made with notice of the previous assignment to Ponnu. There is a doubt as to the genuineness of the agreement in Chinese (Ex. P.1) because of the dissimilarity in the purported signature of Yong Meng Hua on it compared with the signature on the agreement of assignment AB. 1-3. I am not referring to the fact of the signature being horizontal or otherwise but to the actual writings. Besides the agreement P.1 was purportedly witnessed by Leow Mook Swee, but no explanation was offered why he was not called to testify in court."

The first part of the Judge's ruling is already dealt with above. More important is the ruling regarding his doubt as to the genuineness of the signature of the deceased in the third agreement that is fatal to the appellant's case. It is not proper to attempt making any conclusion on the genuineness of a signature in a document by comparing two similar handwriting without resorting to the opinion of a handwriting expert who is specialised in this field. The requirement becomes incumbent when the handwriting is in Chinese characters in which the Judge in question has no knowledge whatever. It is insufficient to rely on the opinion of an ordinary witness and the more so an interested party in the person of David Yong who in his testimony said he was not certain whether the signature on the third agreement (Ex. P.1) was that of his father. Although he ventured an explanation, he only suspected that the signature was not written by his father. He might be familiar with his father's handwriting but in the circumstances of the case it is unsafe to accept his opinion on the matter. There are elementary requirements of our law of evidence and should not be departed from (Sections 45 and 47 of the Evidence Act, 1950). We are of the view that the third agreement is in no way void but valid and we are satisfied that Lot 27 was purchased by the deceased from Paw by virtue of the third agreement according to the terms and conditions stated therein. On his death, it should be included in the assets of his estate.

With regard to the second issue as to whether the transfer by Paw of Lot 27 to the respondent was fraudulent, the learned Judge concluded that it was not. He made certain specific findings. First, he ruled that Paw was lying in stating that he had signed blank transfer forms in favour of the respondent and held that Paw was not a reliable witness and rejected his evidence on the issue. On hearing the defence story, he concluded that David Yong, the respondent's husband, was also not scrupulously honest for having committed the following:

"(a) He took the receipt AB.24 given by Paw showing amount of $10,000/- only whereas the amount paid was $40,000/- by which Paw hoped to evade taxation;

(b) He allowed Paw to state consideration of $2,500/- only in the document of transfer AB.18-21 by which Paw hoped to evade taxation;

(c) He stated in the application for permission of transfer D4 that he and the Defendant wanted to acquire the land for the purpose of building a house thereon whereas there was already a house on it."

However, he accepted David Yong's explanation that Paw had threatened to sell the property to another person if he insisted on getting a receipt for the $40,000/- and that he would then lose his money. Unfortunately David Yong's admission in cross-examination that he had colluded with Paw to make the false statements stated above with a view to defrauding Inland Revenue by avoiding property gains tax had not been accorded that serious consideration. The whole blame appeared to have been directed towards Paw at whose instance it was alleged, the false statements are made in the application for permission to transfer (Ex. D.4). It was conceded by the defence counsel during the proceeding that D.4 was not included in the list of documents.

David Yong's evidence as accepted by the

learned Judge was that he purchased Lot No. 27 from Paw for $40,000/- without knowledge of the prior sale to his late father. He refused to pay $5,000/- when Paw produced the cheque issued by his father but agreed subsequently to loan $20,000/- to Paw on payment of interest. However when Paw could not pay him, he agreed to purchase the property for $40,000/- and subsequently also paid up the $5,000/- on the cheque. All in all therefore he paid Paw $45,000/-. Paw having received $12,000/- earlier from David Yong's father by virtue of the third agreement, the sum total he had received for Lot 27 was $57,000/-. Surely an educated man like David Yong who had taken over his father's business assisted by an educated wife, the respondent, who is also a director of the company would not have fallen into such a deception by Paw merely on the ground that he was not aware of the existence of the third agreement between Paw and his father. Such state of affairs is most improbable. He also made a vital contradiction regarding his knowledge of Ponnu occupying and having been assigned No. 27 in 1978 after Ponnu had shown him the first agreement some time in March 1978. His explanation was again accepted by the learned Judge. However, according to Ponnu who was accepted by the Judge as an honest and reliable witness he requested the appellant and David Yong for a cross-transfer of No. 27 about ten weeks or so after the deceased's death which should be in November or December of 1976. Surely in the circumstances the assignment of No. 27 to Ponnu would have been the topic of discussion for otherwise David Yong would not have agreed to transfer it to Ponnu. The other vital point is that David Yong's claim of having paid Paw $40,000/- for Lot 27 were not supported by any receipts. Only the receipts of $10,000/- and $5,000/- respectively acknowledged by Paw were produced. (See pages 188 and 189 of the Record). The rather lame excuse by David Yong for the absence of the receipts for the other sum of $25,000/- was that he had returned them to Paw. On the other hand, the payment of $15,000/- went in support of Paw's evidence that he received $10,000/- from David Yong in payment for Lot 27 as stated in the receipt and pursuant to the third agreement. The $5,000/- was paid to him in payment of the cheque issued by the deceased. (See page 211 of the Record). All these point to the inherent probability that what David Yong paid Paw was the amount still owed by the deceased on the third agreement. Although the learned Judge had ruled that Paw was an unreliable witness, it does not mean that all his evidence had to be rejected. The trial Court could still consider and accept any part of his evidence which are corroborated by independent evidence, documentary or otherwise.

Had the learned Judge considered these evidence in their proper perspective, we are certain that he would have second thoughts as to the credibility of David Yong as a defence witness. With respect, we feel that he had not taken the proper advantage of having seen and heard the witness in arriving at his conclusion on credibility. As justice requires, we have to interfere by concluding that David Yong's testimony must be treated with grave suspicion.

It should be borne in mind that the collusion between Paw and David Yong in making false statements as stated earlier, resulted in Lot 27 being transferred to the respondent. Further, the effect of David Yong's dealing with Ponnu resulted in Lot 32 also being transferred to the respondent. As a result, David Yong and his wife obtained both lots. The next step they did was to allow the appellant and the children to continue occupying the house in Lot 32 for an indefinite period "so long as she does not harass us", obviously treating Lot 32 as the respondent's own. With regard to Lot 27 instead of transferring it to Ponnu as agreed, the house on the said Lot was subsequently included in the assets of the estate of the deceased. The Court Order was made by consent which in the circumstances must be of the beneficiaries which of course include David Yong. The appellant was appointed a co-administratrix and caveat lodged by her was ordered to be removed. (See pages 209 and 210 of Appeal Record.) The pertinent question that arises is whether David Yong had the intention of transferring Lot 27 including the house to Ponnu. It does not appear to be so. It might be due to Ponnu's letter to his solicitors withdrawing his consent to transfer Lot 32 to the respondent because of the caveat on Lot 27 lodged by the appellant, of which a copy was sent to the respondent. We do not know for certain. This point, however, was not raised before the learned Judge who mentioned the petition for administration only in passing in his judgment. Be that as it may, it seemed to us that David Yong and the respondent had changed their minds by agreeing that house No. 27 should go to the estate and not to Ponnu perhaps in order to have the caveat removed. Two more questions arise here, *viz.*, since the house goes with the land why did they not agree to transfer Lot 27 as well to the estate of the deceased? The answer might be because Lot 27 had to be transferred to Ponnu which was never done, but what good would it be to Ponnu to have the land without a house of his own? If there is any one who stands to

lose in the conflict between the two parties in the family of the deceased, it was Ponnu. Anyway since Lot 27 is the centre of the conflict between the parties, it might well be that Ponnu should revert to the original arrangement with the deceased based on the second agreement concerning Lot 32. After all, the Lot was approved to him by the government and he had paid its price. The house had already been constructed thereon for him. The only point that remained is his purported transfer of Lot 32 to the respondent. He had already instructed his solicitors to withdraw his consent for its transfer to the respondent and no application for transfer appeared to have been made by the latter.

Turning to the main issue, it is clear to us from the points discussed above that David Yong's part in the transfer of Lot 27 to his wife was tainted with fraud, the transfer having been made well knowing of the existence of the third agreement, *i.e.*, sale by Paw to the deceased and that Lot 27 belonged to the deceased. In the case of the respondent, evidence show that after the death of the deceased, she and her husband came to stay in house No. 32 with the family for about two months. As a daughter-in-law, she would have been aware of the family discussions regarding the estate. She is educated and helps her husband in running the business which he has taken over and is a director thereof. All the relevant forms and documents which bear the false statements discussed earlier were filled in by her and according to David Yong, she contributed to part of the $10,000/- purported to have been paid to Paw in the transfer transaction of Lot 27. After having obtained the transfer to her name, the respondent and her husband raised an overdraft from the Malayan Banking to finance the company's business but was prevented in time by the intervention of the appellant who showed the third agreement to the manager. As a result, according to the respondent, she was approved $10,000/- instead of $30,000/- overdraft. All these circumstances lead to the only probable and irresistible inference that she well knew at all material times that Lot 27 belonged to the deceased. The very fact that David Yong's activities got both the lots transferred to his wife at the expense not only of the estate of his father but also at the expense of Ponnu who is completely innocent clearly shows that David Yong was guilty of fraud and the very purpose of transferring the two lots to his wife was clearly intended to place these two properties beyond the reach of the estate. If that is not fraud, then we do not know what is. The respondent being the wife and the recipient of the transfer cannot shelter behind the fraudulent transfers especially when it is shown in evidence that she has taken an active part in the transaction.

This is a case where the learned trial Judge has failed to take into account the probative value of the evidence which had been proved and in the circumstances we have to interfere (*Johara Bi* v. *Lawrence Lam*[1]). We are satisfied that the transfer of the said Lot to her name was fraudulent and although she is the registered owner she cannot claim indefeasibility of title under section 340 of the National Land Code because of fraud under subsection 2(a) to which she was privy. Nor can she be termed as a purchaser in good faith and for valuable consideration under the proviso of the section in order to protect her title or interest. We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan* v. *Official Assignee, Rangoon*,[2] *Saminathan* v. *Pappa*[3]). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt. (See "proved" at section 3 of the Evidence Act, 1950 and *Liew Kaling & Ors.* v. *Public Prosecutor*.[4]) In the present appeal before us, the facts and circumstances of the case in relation to the part played by the respondent point to the probability that any prudent man would under the circumstances accept it to be fraudulent.

With regard to the cross-appeal by the respondent for damages due to alleged wrongful caveat by the appellant of Lot 27, for the reasons stated above and on the grounds accepted by the learned Judge with which we agree, we dismissed the cross-appeal with costs.

*Appeal allowed; cross-appeal dismissed.*

Solicitors : *Wahab Rashid & Co.; Chan, Moosdeen & Partners.*